



"If I'm so empowered, why do I need you?"
Defining Government's Role in Internet Electronic Commerce

Introduction

From the outset, government in America was designed to be limited. The idea was not that government lacked the brute force to do certain things. Rather, there was a belief that some of what government could do it should nevertheless not do.

Another limit on government is geography. Geographic borders represent political agreements about who governs where. Aside from military actions, borders impose limits on where a government may operate. If something happens within the borders of Country A, Country A's laws govern it.

The Internet – which is seemingly ubiquitous and nowhere in particular at the same time – challenges both of these notions of limits. It may even challenge the limits of government's brute force powers. Yet, even if our Constitution permits government to act, even if multi-state and international agreements allow borders to be transcended, and even if government feels buff enough to take on the Internet, now is an exceptionally good time to refocus on the threshold of "should".

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Unarguably for the present, probably to the horizon, and perhaps for all time, aggressive attempts by government to restrict what happens on the Internet will be only marginally effective when confronted by a combination of technology, borders, and consumers' choices. Paradoxically, as consumers surf and shop today on the borderless and largely ungoverned Internet, they have ready access to technology and market-provided choices that can help them meet the privacy, security, and product warranty concerns they have for themselves and their children. In any event, what is truly the alternative? If the Internet really is a force for freedom in the censor-enabled and democracy-hostile environment of mainland China – and it is – can a country founded on notions of free speech *effectively* restrict on-line content?

Extensive government regulation would certainly impose substantial costs on all e-commerce companies. Yet, extensive government regulation – as it has done many times in the past – could well block new market entrants and thereby actually help established companies entrench themselves. From the perspective of the e-commerce companies represented on the Council, which are relatively well funded and established compared to many others in the industry, this might seem an attractive option. Yet, that is a bargain not one of us wants to make, it is one which government should not offer, it poses risks the public should not suffer, and it is demonstrably unnecessary to serve the public's interests.

"Global electronic commerce" is ...

...a term used to describe commercial transactions and non-commercial activities facilitated through the use of information technology and network technologies, such as the Internet, intranets and extranets.

Citizens...

- using the Internet to learn more about a product before driving to the store to purchase it;
- placing an order online and having the product physically shipped to the front door;
- ordering and receiving software, music or a video without ever leaving the house;
- participating in a degree program from a college hundreds of miles away; or
- renewing a driver's license at a kiosk on the corner.

Businesses...

- custom designing clothing to customers' dimensions provided online;
- managing inventory using barcode readers from remote locations to send data to a central warehouse;
- providing company and product information, and technical assistance online all day and all night;
- creating fully automated, online systems for ordering products and services from vendors and suppliers; or
- allowing consumers and businesses to order and receive products and services safely and securely online.

Government and Other Public Service Organizations...

- posting information online to inform citizens and facilitate interactions;
- collecting income tax filings via the Internet;
- fielding Requests for Proposals (RFPs) and other procurement requirements online;
- offering remote instruction to students around the country and around the world; or
- integrating technology and Internet-based curriculum components into daily classroom activities.

Excerpt: *Guide to Global Electronic Commerce Readiness*,
Computer Systems Policy Project, (July 1998)
http://www.cspp.org/projects/cspp_gec/data.html

We fully agree with public officials and public interest groups that the Internet is a robust technology that helps democratize access to information and thereby empower individuals. That is the very nature of the Internet. We also agree that privacy, security, protection against fraud, and protection of children are essential elements of the public's interest in the Internet. The disconnect occurs when some call for government to promote these goals by seeking to directly apply its powers to regulate rather than working to enhance the power of individual users to make informed choices. At the least, before pursuing the proscriptive route, government should compare the likely outcomes of a system that relies on regulations versus one that focuses on enhancing an individual's access to decision-critical information.

Government certainly does have a role beyond promoting consumer education. In the privacy context, we do support government setting limits on the distribution of some types of sensitive personal information, such as financial and medical records. And, when companies advertise falsely, commit fraud, or otherwise fail to meet representations made to consumers on the Internet – such as by using personal information for purposes not disclosed when the information was collected – government should have the tools to seek redress and use them.

Whether government takes the measured approach we recommend here or something broader, we urge that initiatives seek to protect consumers' interests, not their "Internet interests". For example, personally identifiable information is often collected at websites and it is used for direct marketing in some instances without first obtaining informed consent from the person from whom it was solicited – though occasionally the information provided is actually the "payment" being made by a consumer in order to obtain a premium. These practices have received enormous amounts of attention in the public policy arena, and the Vice President has announced an on-line privacy initiative, an "Electronic Bill of Rights".

Yet, these same data collection practices have existed for years in the off-line world, and computerization is helping them to become increasingly sophisticated. Consumer product warranty cards are one means of building a mailing list; magazine sweepstakes are another. And, when a consumer calls a merchant's toll-free 800/888 line, there is no way she can block her number from appearing on the merchant's caller-ID screen.

A new example of passive, yet comprehensive data collection is supermarket discount "club cards", which track every item purchased and can therefore certainly provide more details about an individual than Internet cookies. Yet, there are no calls for a "Supermarket Shopping Bill of Rights".

In short, the very real issue is privacy, not merely "Internet privacy." Analog and digital, both. If there are to be new regulations, they should not target the medium – they should target the problem. They should be neutral.

In our report, we apply this neutrality concept broadly. For example, we support the Internet Tax Freedom Act (ITFA)¹ recently passed by Congress because it will arrest state attempts to levy taxes that discriminate against the Internet. We also oppose tax discrimination in the Internet's favor, and that is why we call for development of a streamlined, clear, and low-cost system for the collection of sales taxes on Internet and other interstate purchases of tangible goods – all of which is possible during the three year moratorium provided by the ITFA.

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Some variation in the rules and their application are to be expected between the virtual and bricks-and-mortar worlds. The goal should be meeting the public interest. For example, California law requires that whenever an auction is conducted, the auction company must first "post a sign, the dimensions of which shall be at least 18 inches by 24 inches, at the main entrance to each auction".² Failure to comply is punishable by a \$50 - \$100 fine. Sanity has prevailed and no one has sought to require posting a 30-inch diagonal sign on a 15-inch diagonal computer screen. And, if the California Legislature decides to eliminate the physical signage requirement solely for on-line auctions, it will not generate objections from bricks-and-mortar auction houses. Yet, even without benefit of a large sign, any consumer visiting an auction website receives inescapable notice that an auction is in progress – which is the underlying purpose of the law.

In some instances, rather than reworking existing regulations to better fit the Internet, e-commerce will begin to justify repeal of bricks-and-mortar rules. For example, in California the sale of shrink-wrapped, packaged software is subject to state and local sales taxes; under longstanding state tax laws, the sale and delivery of the same software via the Internet, even from a California seller to a

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California buyer, is non-taxable. Not surprisingly, buyers of expensive commercial software are starting to write contract terms that require electronic delivery. In this context, our report calls on the State to consider repealing the sales tax on items such as software, music, and books as electronic delivery becomes commonplace. We realize that this initiative would reduce tax revenues, especially for local governments. However, if done in conjunction with the new federal system we support allowing collection of sales taxes on the interstate sale of tangible goods, there should be more than enough leeway to offset such tax reform.

In the spirit of limits – a term that captures the Council's collective philosophy as to how government should approach the Internet – the following sections of our report cover a limited number of critical public policy issues involving e-commerce and set out our recommendations for action and determined inaction in Sacramento, as well as in other state capitals and Washington, D.C. This is our response to Governor Wilson, who asked us just a few short months ago to recommend how government could "further engender the development of electronic commerce by clarifying, modifying, or removing existing policies and practices, or implementing new ones."

¹ A summary of the Internet Tax Freedom Act is contained in the section of this report entitled, "Tax problems start at the border". [^{**} Insert link here]

² CA Civil Code section 1812.607(b) <http://caselaw.findlaw.com/cgi-bin/getcode.pl?code=CA&law=civ&frame=right2&art=1812.600-1812.608>